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ALLIANZ GENERAL INSURANCE COMPANY (MALAYSIA) BHD v. BEST RE (L) LTD

HIGH COURT MALAYA, KUALA LUMPUR
KHADIJAH IDRIS JC
[CIVIL SUIT NO: WA-22NCC-113-03-2016]
B 27 OCTOBER 2017

CIVIL PROCEDURE: *Pre-trial – Case management – Non-compliance with court's directions to file witness statements – Delay in filing witness statement – Allegation of being deprived of further and better particulars – Whether non-availability of detailed information caused defendant difficulty to prepare and finalise witness statement – Whether reasons provided for delay reasonable – Whether appropriate for court to invoke O. 34 r. 2(3) of Rules of Court 2012*

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The plaintiff filed an action against the defendant claiming a sum of RM1,422,014.96 which was due and outstanding from the defendant to the plaintiff ('writ action'). The plaintiff subsequently amended its statement of claim. It was the defendant's stance that the plaintiff's amended statement of claim was insufficient and not specific enough to enable the defendant to plead a proper defence. In the circumstances, the defendant applied for further and better particulars on 25 April 2016 *vide* encl. 7. The court allowed the defendant's oral application for leave to file their defence after the disposal of encl. 7. Enclosure 7 was heard on 17 June 2016 and adjourned for decision. On the same day, the court fixed 13-15 December 2016 and 10-11 January 2017 for the trial of the writ action. Enclosure 7 was dismissed on 12 July 2016 and on the same day, counsel for both parties appealed for the trial dates on 13-15 December 2016 be vacated. The court allowed it and the date was replaced with 12-13 January 2017. On 19 July 2016, *vide* encl. 21, the defendant filed an application to stay the writ action pending the disposal of their appeal to the Court of Appeal in respect of encl. 7. However, the defendant's application in encl. 21 was dismissed. The plaintiff had again amended their statement of claim and accordingly, the defendants were directed to file their amended defence by 9 November 2016. On 8 December 2016, the defendant's counsel sought a further adjournment due to her health condition. As such, the court vacated the trial dates on 12-13 January 2017 and replaced it with 11-14 April 2017. However, on 31 January 2017 the defendant filed a notice of change of solicitors where the present solicitors took over the conduct of the matter from the previous solicitors. After several sequence of events and court directions, on 3 April 2017 both parties were directed to file their witness statements on 4 April 2017, *ie,* seven days before the commencement of the trial date. Resulting from the defendant's failure to file the said witness statements within the prescribed time, the plaintiff filed a notice of application *vide* encl. 59 under

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O. 34 r. 2(3) of the Rules of Court 2012 ('ROC') and sought, *inter alia*, an order that the defendant's defence be struck out and judgment to be entered in favour of the plaintiff. The court allowed the plaintiff's application. Dissatisfied, the defendant appealed against the said decision. It was the defendants argument that the delay was caused because (i) the defendant faced difficulty to prepare and finalise the witness statement due to non-availability of detailed information of the plaintiff's claim because their application for further and better particulars was dismissed by the court; and (ii) the defendant's witness one En Sharafat Ali had just returned to Malaysia after undergoing medical treatment abroad.

Held (allowing plaintiff's application in encl. 59 with costs):

(1) Being deprived of further and better particulars was no longer an issue at this stage. The defendant's appeal against the dismissal the defendant's application for further and better particulars, was dismissed by the Court of Appeal. It was obvious that the Court of Appeal took the stance that the trial of the writ action was to proceed as scheduled. Therefore, it was incumbent on the parties to take all the necessary steps which included strict adherence to the pre-trial directions given by the court. Moreover, the defendant was not in the position to use the purported lack of detailed information as an excuse for their non-adherence. (para 40)

(2) There were no evidence adduced to show that the said witness was out of the country during the material time and that he had obtained medical treatment. Based on records, the trial dates of 11 until 14 April 2017 was fixed by the court on 8 December 2016. As such, when the present solicitor took over the conduct of the matter from the previous solicitor on 23 January 2017, they knew that the trial dates had already been set by the court. In fact, when directions were made on 3 April 2017 for parties to file their witness statement on the next day, there were no indication whatsoever from the defendant's solicitor that they would not be able to do so. The fact remained that, when directions were given on 3 April 2017 for parties to file and exchange the witness statement, the defendant's solicitor agreed. As such, the defendant's solicitor was duty-bound to comply with such direction. In the circumstances, the second reason was an afterthought. (para 40)

(3) The defendant's witness statement was only filed on 7 July 2014 which was three days after the date it was supposed to be filed and exchanged with the plaintiff's witness statement and three days before the commencement of the trial. Although there was only a few days delay in complying with the court's direction, the fact remained that there was non-compliance on the part of the defendant with the court's pre-trial directions, not once but thrice. It had certainly deprived the plaintiff of

A the benefit of the defendant's witness testimony in the examination-in-chief for purpose of a proper and adequate pre-trial preparation. It was the duty of the parties to cooperate with the court by adhering strictly to the directions given by the court. (para 40)

B **(4)** The defendant's failure to comply with the court's directions was a display a nonchalant attitude of the defendant's solicitor towards the court's directions. The court was prepared to allow the defendant space and opportunity when they failed to comply with the directions made on 2 March 2017 and 13 March 2017. Having given the opportunity to redeem itself, the defendant ought to be vigilant in the manner how they C manage their case. However, this was not to be. The defendant's latest breach and their conduct in relation to complying with the direction to file the witness statement was construed to be intentional and contumelious. Such conduct had cast serious doubt on the defendant's sincerity in the discharge of its duty to assist the court in the expeditious, D just and economical disposal of the writ action. Therefore, it was appropriate for the court to invoke O. 34 r. 2(3) of the ROC. Such order though drastic, it was crucially necessary to ensure the underlying objective of a robust case management system which did not easily tolerate lax enforcement of case management directions. E (paras 46 & 47)

Case(s) referred to:

Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors [2010] 1 LNS 830 HC ***(refd)***
Diong Hiew King v. Lau Swee Nguong [2012] 1 LNS 1086 HC ***(refd)***
Hong Leong Assurance Bhd v. American Home Assurance Company-Malaysia [2008] 1 LNS 141 HC ***(refd)***
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How Hock Sing v. Lee Say Peng & Ors [2015] 9 CLJ 368 HC ***(refd)***
Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd [2004] 3 CLJ 88 CA ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Bhd [2000] 1 CLJ 503 CA ***(refd)***
PP v. Wong Yee Sen & Ors [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902 HC ***(refd)***
Sunway PMI-Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd [2003] 5 CLJ 63 HC ***(refd)***
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Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd [2012] 9 CLJ 557 FC ***(refd)***
United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors [1994] 3 CLJ 144 SC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 18 r. 2(1), O. 34 rr. 1(3), 2(3), O. 38
H Rules of the High Court 1980, O. 34 r. 7

For the plaintiff - Lim Qi Si; M/s Suflan TH Liew & Partners
For the defendant - Philip Teoh & Hafeez Johan; M/s Azmi & Assocs

Reported by Sandra Gabriel

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JUDGMENT

Khadijah Idris JC:

Introduction

[1] This is the defendant's appeal against my decision made on 7 April 2017 allowing the plaintiff's application (encl. 59) under O. 34 r. 2(3) of the Rules of Court 2012 (ROC 2012) for the defendant's defence to be struck out and judgment be entered in favour of the plaintiff.

[2] Plaintiff filed legal action *via* WA-22NCC-113-03-2016 against the defendant claiming a sum of RM1,422,014.96 which is due and outstanding from the defendant to the plaintiff (writ action). Plaintiff's cause of action against the defendant is premised on various reinsurance contracts entered between the parties for various risks and coverage. Despite repeated demands, the defendant failed to pay the sum RM1,422,014.96. Thus, the writ action filed by the plaintiff to recover the full outstanding sum.

Factual Background

[3] Plaintiff, Allianz General Insurance Company, is a private company incorporated in Malaysia engaged in business as general insurer. The defendant, Best Re (L) Limited, is a company registered in the Labuan Offshore Financial Centre and engaged in the insurance business including accepting and undertaking reinsurance risks from general insurers under facultative and treaty reinsurance arrangements.

[4] For the purpose of this appeal, the plaintiff's case as stated in their statement of claim dated 21 March 2016 and subsequently amended statement of claim dated 9 November 2016 may be summarised as follows:

(a) the defendant has entered into various reinsurance arrangements with the plaintiff and the plaintiff's predecessor (Commerce Assurance Bhd) providing facultative reinsurance coverage to the plaintiff in respect of various policies of insurance which the plaintiff has issued to their insureds covering them for general insurance risks (the facultative reinsurance). The defendant also provided treaty reinsurance coverage for specific classes of insurance as agreed between the parties (the treaty reinsurance). Further, the plaintiff also entered into and obtained captive reinsurance coverage from the defendant (the captive reinsurance).

(b) the parties relied on the statement of accounts prepared on quarterly basis and dealt with each other based on the running accounts. Payment of claims and premiums were made by parties accordingly based on the statements.

(c) the defendants incurred various liabilities under the reinsurance arrangement to pay to the plaintiff claims which the plaintiff had paid under such reinsurance arrangements (the paid claims).

(d) besides the paid claims, various claims have also been made under policies in respect of which the defendant provided reinsurance coverage and for which the plaintiff has provided the appropriate reserves to cover such claims (technical reserves).

(e) as at third quarter of the year 2015, a sum of RM1,422,014.96 was due and outstanding from the defendant to the plaintiff based on the statements which the defendants accepted without any dispute or question.

(f) despite repeated requests and demands, the defendant failed and/or neglected and has persisted in its failure or neglect to settle all the claims under the reinsurance arrangements.

[5] In the case of the defendant although they admit providing the facultative reinsurance coverage, treaty reinsurance coverage and the captive reinsurance coverage, they deny the claim made by the plaintiff as they are unable to ascertain as to which particular or specific facultative reinsurance contracts, treaty reinsurance contract, the captive reinsurance contract the plaintiff is referring to in their amended statement of claim. As such, the defendant makes no admission of liability in respect of the various reinsurance contracts entered into between the plaintiff and the defendant.

[6] It is the defendant's stance that the plaintiff's amended statement of claim is insufficient and is not specific enough to enable the defendant to plead proper defence. According to the defendant, there are in total 697 reinsurance contracts and the plaintiff's amended statement of claim contained insufficient particulars as to which specific reinsurance contract that the plaintiff is relying upon. The defendant had requested for further information from the plaintiff as to the specific reinsurance contracts relied by the plaintiff and its details and/or breakdown and the computation of the plaintiff's claim of RM1,422,014.96 but the plaintiff has refused and/or neglected to provide the same.

[7] It is the defendant's position that they have the right to inspect the plaintiff's books and records in respect of the reinsurance arrangement referred to by the plaintiff to enable the defendant to investigate and process

the plaintiff's claims. The right to investigate is a standard reinsurance industry practice to ensure the amounts paid by the plaintiff in respect of claims made by the original insured is genuine and verified.

Enclosure 7 - Defendant's Application For Further And Better Particulars

[8] On 25 April 2016 the defendant filed an application for further and better particulars (encl. 7) pursuant to O. 18 of the ROC 2012 and/or inherent jurisdiction of the court. In encl. 7, the defendant sought from the court for the following orders:

(a) the plaintiff do within seven days deliver to the defendant further and better particulars in writing the specific facultative reinsurance contracts, treaty reinsurance contract and the captive reinsurance contract (ie, policy numbers, type of insurance, period of insurance and breakdown the various reinsurance contracts) referred to in the plaintiff's statement of claim. A request for further and better particulars in respect of the said various reinsurance contracts by the defendant's solicitor but the plaintiff's solicitor failed to provide the same; and

(b) that unless the said particulars be delivered within seven days from the date of the order to be made herein the paragraphs in the statement of claim containing the allegations of which the particulars herein are requested shall be struck out without further order and in consequence, the claim against the defendant be dismissed.

[9] The defendant submits they are entitled to receive the further and better particulars relating to the statement of claim in order that the defendant be informed of the reasonable particulars pertaining to the matters claimed against the defendant and further to determine what evidence ought to be prepared for the trial of this matter.

[10] On 13 May 2017 the court allowed the defendant's oral application under O. 18 r. 2(1) of the ROC 2012 for leave to file their defence after the disposal of encl. 7.

[11] Enclosure 7 was heard on 17 June 2016 and adjourned for decision. On that hearing date, the court fixed 13-15 December 2016 and 10-11 January 2017 for the trial of the writ action. The dates were fixed after taking into account the convenient dates of both parties.

[12] In respect of encl. 7, after considering the facts and both parties, submission, I dismissed the said application on 12 July 2016 on the ground, amongst others, the plaintiff had in its statement of claim pleaded material facts and that the facts pleaded are sufficient for the defendant to file its defence. On the same day, the court directed the defendant to file their defence by 2 August 2016 and the plaintiff to file their reply to the defence by 16 August 2017. Counsel for both parties also appealed for the trial dates

on 13-15 December 2016 be vacated as lead counsel involved are scheduled to travel overseas. Counsel apologised saying the dates were mistakenly thought to be convenient to them. The court vacated 13-15 December 2016 and replaced the vacated date with 12-13 January 2017.

[13] *Via* notice of appeal dated 14 July 2016, the defendant appealed to the Court of Appeal against my decision in dismissing their application encl. 7. On 19 July 2016, the defendant filed an application for stay (encl. 21) of the writ action pending the disposal of their appeal in respect of encl. 7. The defendant informed the court that the Court of Appeal has directed for appeal records to be filed and that the appeal will be disposed of expeditiously. The defendant cited, amongst others, insufficient facts in respect of the various reinsurance contracts on which the plaintiff grounded its claim as special circumstances. Further, if the defendant were to file their defence before appeal is disposed, it would be a waste of time and costs if the appeal is allowed. The plaintiff resisted the application, arguing the appeal will not be nugatory whatever the decision of the Court of Appeal be. Up to that date, the defendant has yet to file their defence even though extension of time was given by the court. The plaintiff reiterated their stand that the defendant is in a position to file their defence. If the defendant's appeal is allowed, the defendant can always amend their defence to take into account the further and better particulars to be obtained from the plaintiff. After hearing submission of both learned counsel on 2 August 2016, I dismissed the stay application as I was satisfied there were no special circumstances to justify the court to exercise its discretion to stay the proceedings pending the disposal of the defendant's appeal against my decision dismissing encl. 7. The court then directed the defendant to file their defence by 5 August 2016. The defendant appealed against my decision in dismissing their application for stay. The said appeal was subsequently dismissed by the Court of Appeal.

[14] In the meantime, the plaintiff sought to amend their statement of claim *via* notice of application dated 10 October 2016 (encl. 35). Defendant did not object to the said application and on 26 October 2016, the said plaintiff's application to amend was allowed. Consequently, defendant was given leave to file their amended defence by 9 November 2016 and the plaintiff to file amended reply, if necessary, by 23 November 2017. In respect of pre-trial directions, the plaintiff was directed to furnish bundle of documents by 16 November 2017 to the defendant who was directed to respond on 7 December 2016.

[15] On 8 December 2016, the defendant's counsel informed the court of her health condition and the treatment that she needs to go through. She also informed that the Court of Appeal had adjourned hearing of the defendant's appeal in respect of encl. 7 from 15 December 2016 to 7 March 2017 due to her health condition. As such, the defendant's counsel requested the court to vacate the trial dates fixed on 12-13 January 2017 until after 7 March

2017. The plaintiff's counsel confirmed she was informed of the health condition of the defendant's counsel and she has no objection for the trial dates in January 2017 to be vacated. The court vacated the trial dates in January 2017 and replaced it with dates on 11 to 14 April 2017. Again the plaintiff was directed to forward bundle of documents to the defendant by 17 January 2017 for classification purposes. On 31 January 2017, the defendant filed notice of change of solicitor where Messrs Azmi & Associates took over the conduct of the matter from Messrs Skrine. Between January until early March 2017 both parties were still sorting out the bundle of documents. On 2 March 2017 the court was informed that the defendant has not responded to the plaintiff in relation to the status of the documents for purpose of preparing the bundle of documents. The court directed for the bundle of documents to be filed by 10 March 2017 and case management was fixed on 13 March 2017. However no bundle of documents was filed on 10 March 2017.

[16] On 13 March 2017, the parties informed that they finally agreed on the bundle of documents and that all the documents are placed in category B. Based on records, no reasons were given for failure by the parties to file the CBD by 10 March 2017. Further directions were given for the CBD, parties' case summary, agreed facts, issues to be tried and list of witnesses to be filed by 23 March 2017. Failure to do so, the writ action will be struck out. The next case management date was fixed on 23 March 2017. The court was also informed the defendant's appeal in respect of encl. 7 was dismissed by the Court of Appeal.

[17] On 23 March 2017, based on records, the plaintiff has filed the following documents:

(a) the CBD was filed on 14 March 2017;

(b) plaintiff's case summary and list of witnesses filed on 22 March 2017; and

(c) plaintiff's agreed list of issues to be tried and statement of agreed facts on 23 March 2017.

[18] However, the defendant failed to file their case summary and list of witnesses by 23 March 2017 and sought for the said documents to be filed by 3 April 2017. To this, the plaintiff gently reminded the court that there was an unless order issued by the court on 13 March 2017 for non-compliance with the orders made on even date. However, plaintiff chose not to pursue the unless order. The court then directed the defendant to file its case summary and list of witnesses by 31 March 2017. Again the court issued an unless order against the defendant if they failed to comply with the

directions. A final date for case management was fixed on 3 April 2017. The records show the defendant had filed their case summary and list of witnesses on 31 March 2017. On 3 April 2017, the parties were directed to file their witness statements on 4 April 2017 which is seven days before the commencement of the trial date scheduled on 11 April 2017.

[19] On 5 April 2017, the plaintiff filed a notice of application under O. 34 r. 2(3) of the ROC 2012 seeking the following order:

(a) the defence be struck out for failure on the part of the defendant to comply with the direction of the court to file and exchange the witness statements by 4 April 2017 and accordingly judgment be entered in favour of the plaintiff for the sum claimed in the amended statement of claim filed on 26 October 2016, with interest and costs; and

(b) costs of the application be borne by the defendant.

[20] The plaintiff's grounds for seeking such order are the following:

(a) parties were directed to file CBD by 10 March 2017 and a further case management was fixed on 13 March 2017 to monitor compliance with the court direction;

(b) on 13 March 2017 plaintiff was unable to file the CBD because the defendant had failed to response with their classification of the plaintiff's CBD which was sent to the defendant through the plaintiff's solicitors letter dated 13 February 2017. A copy of the said letter is attached and marked as exh. "LQS-1" in the plaintiff's affidavit encl. 60. It was only on the case management date itself (13 March 2017) before parties entered into the chambers that the defendant belatedly informed the plaintiff's counsel that the defendant's classification of all the documents was under part "B". The defendants further informed that they did not have any documents to be included in the CBD. This was more than a month after the plaintiff had sent the plaintiff's bundle of documents to the defendant. The court then directed that the plaintiff filed the CBD on 15 March 2017, the list of issues to be tried, statement of agreed facts, parties' case summaries, list of witnesses by 23 March 2017;

(c) the plaintiff had duly filed the CBD on 14 March 2017. The plaintiff's case summary, list of witnesses was filed on 22 March 2017. The agreed list of issues to be tried and statement of agreed facts was filed by plaintiff on 23 March 2017;

(d) however at the next case management date on 24 March 2017 the defendant failed to file their case summary and list of witnesses. In the interest of justice, the court granted a final opportunity to the defendant to file the said two documents by 31 March 2017 failing which the court will invoke the unless order against the defendant. Parties were also directed to file and exchange their respective witness statement by

4 April 2017. The case summary and list of witnesses were duly filed by the defendant on 31 March 2017; and

(e) as directed, the plaintiff duly filed their witness statement on 4 April 2017. However, defendant failed to do so. The defendant's counsel informed the plaintiff's counsel that they will not be ready to file their witness statement on the 4 April 2017 and that the same will be filed before the trial with no specific date of filing.

[21] The defendant did not give any reason for the non-compliance of a crucial direction regarding the filing of the witness statement. Further, the defendant never at any point in time indicate to the court that it will not be able to file its witness statement by 4 April 2017. The defendant also did not request for an extension of time from the court of the plaintiff when it failed to do so.

[22] The plaintiff submits the defendant has deliberately disregarded the court's direction to file their witness statement by 4 April 2017. This is not the first time the defendant failed to comply with the direction of the court. A historical analysis of the proceedings shows that the defendant has a history of repeatedly disregarding directions made by the court. The direction for the witness statement to be filed and exchanged at least seven days before the trial was intended to allow parties to sufficiently prepare for the trial. By not complying with such order, the defendant has in effect deprived the plaintiff the opportunity to sufficiently prepare for the trial. The plaintiff further submits the deliberate breaches of the directions given by the court plainly amount to contumelious conduct which cannot be condoned as it brings the administration of justice into disrepute. Therefore, such conduct warrant the most severe sanction from the court.

Defendant's Submission

[23] The defendant filed an affidavit resisting the plaintiff's encl. 59. The said affidavit was affirmed by the defendant's solicitor Mr Philip Teoh Oon Teong who was duly authorised to depose the affidavit on behalf of the defendant. The defendant's solicitor avers the following:

(a) that they took over the case from Messrs Skrine on 23 January 2017. They had advised the defendant that the plaintiff's statement of claim is not sufficient for the defendant or their witnesses to reply as there were no detail information provided in the statement of claim;

(b) the defendant's application for further and better particulars was dismissed by the court;

(c) the defendant's appeal against this court decision *via* Rayuan Sivil No. W-02(IM)(NCC)-1256-07-2016 was heard on 7 March 2017. Mr Philip who appeared before the Court of Appeal submitted that the defendant requires the further and better particulars for their defence. The Court of Appeal did not deny the fact that the particulars applied are important and necessary for the defendant's defence. However, the Court of Appeal was of the view that since the case was already fixed for trial on 11 to 14 April 2017, the trial ought to proceed. The defendant's appeal was dismissed with costs in the cause;

(d) even though the defendant's appeal was dismissed, the order made by the Court of Appeal for the costs to be in the cause shows that the Court of Appeal recognised the particulars applied by the defendant is important and necessary in the trial process; and

(e) as such, it was difficult for the defendant to file its witness statement. Furthermore, the defendant's witness one Mr Sharafat Ali has just returned from his country of origin after getting medical treatment. The defendant said their witness statement could be finalised and filed on 7 April 2017.

[24] In his oral submission, the defendant's solicitor says there is only a few days delay in filing the defendant's witness statement and there is no great prejudice on the plaintiff. Whereas if the plaintiff's application is allowed it will cause great injustice on the defendant who is ready to proceed with the trial for the plaintiff to prove their case and the defendant will respond accordingly. In the interest of justice, the defendant submits the witness statement ought to be admitted for parties to proceed with the full trial. The defendant's solicitor informed the court that they have dealt with other cases where witness statement was filed just before the hearing date.

The Law

[25] Order 34 ROC 2012 deals, amongst others, with the procedures and powers of the court in pre-trial case management. Its primary objective is to enable the court to dispose of proceedings in a just, expeditious and economical manner. For the purpose of the instant case, the relevant provisions under O. 34 r. 2 are as follows:

Pre-trial case management when directed by the Court (Order 34 r. 2)

2 (1) without prejudice to rule 1, at any time before any action or proceedings are tried, the Court may direct parties to attend a pre-trial case management relating to the matters arising in the action or proceedings.

(2) at a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including ...

(3) The Court, having given directions under rule 2(2) or rule 3 may either on its own motion or upon the application of any party, if any party defaults in complying with any such directions, dismiss such action or proceedings or strike out the defence or counterclaim or enter judgment or to make such order as it thinks fit.

(4) Any judgment or order made under rule 2(3) may be set aside by the Court, on the application of the party, on such terms, if any, as it thinks just.

[26] The above provisions are part of the amendment made to the old O. 34 Rules of the High Court 1980 (RHC 1980). Of significance is the incorporation of provisions which provides for specific orders that the court is empowered to make in the event parties fail to comply with any directions given by the court. Under O. 34 r. 2(3) of the ROC 2012 the court may dismiss an action or proceedings or strike out the defence or counterclaim or enter judgment or to make such order as it thinks fit if any party fail to comply with any pre-trial directions given by the court. Under the old O. 34 r. 7 of the RHC 1980 although the court is empowered to make any order as meets the end of justice in the event of non-compliance, it does not explicitly state the order that may be made by the court, as opposed to the new provisions in O. 34 rr. 1(3) and 2(3) of the ROC 2012. In any event, the old provision O. 34 r. 7 of the RHC 1980 was held to clothe the court with the authority, amongst others, to order that defence and counterclaim be dismissed and judgment be entered in favour of the defendant (*Sunway PMI-Pile Constructions Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd* [2003] 5 CLJ 63; [2002] 7 MLJ 538). Obviously, the wide and/or specific powers given to court under the new O. 34 of the ROC 2012 was intended to equip the court with the necessary tools to effectively control the progress of the action and to ensure litigants to an action comply strictly with pre-trial directions for purposes of securing the just, expeditious and economical disposal of actions and proceedings.

[27] The significance and relevance of O. 34 of the RHC 1980 was explained in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 AMR 1 where the Federal Court held:

[9] It is to be noted that O. 34 was a new addition to the RHC 1980 made in 2000 (see PU(A) 342/2000). It was amended again in 2009 (see PU(A) 237/2009). It provided for a radical change in approach to the prosecution

of a case in court. An early recognition of this new regime under O. 34 where the court takes a proactive role in moving the pace of litigation was made by the Federal Court when His Lordship Mohd Noor Ahmad FCJ observed in *obiter* in *Tan Geok Lan v. La Kuan* [2004] 2 CLJ 301 at 312 as follows:

> The significance of this procedure is that it marks a change from the traditional position under which the progress of cases was left largely in the hands of the parties. Now, under the procedure the court controls the progress of cases by the exercise of its powers given to it to enable it, and not the parties, to dictate the progress of cases at the pre-trial stage, ensuring that the practices and procedures applicable during that stage are complied with promptly and not abused.

[28] In *Dato' Ting Check Sii v. Galaxy Grip Sdn Bhd & Ors* [2010] 1 LNS 830; [2011] 1 MLJ 646 the High Court granted the plaintiff's application for adjournment for reason, amongst others, the plaintiff's handwriting expert's supplementary report could not be filed. In allowing the adjournment, the learned High Court Judge directed the report to be filed on a certain date, failure of which the plaintiff claim will be dismissed. The plaintiff failed to comply with such order. The court allowed the defendant's application to have the plaintiff's claim strike out. On the legal effect of an unless order and the consequences of defaulting such order, the court held:

> An unless order, being a peremptory order of the court, must be complied with and its breach should automatically attract the penalty prescribed in the order but of course, before that happens the court must first ensure that the terms of the order was clearly spelt out and there was a complete failure of complying with it. This much was held by the English Court of Appeal in *Reiss v. Woolf* [1952] 2 All ER 112.

[29] For purpose of determining whether an order under O. 34 r. 2(3) of the ROC 2012 ought to be made, I am guided by a string of authorities which has laid down the relevant principles to be taken into consideration. Most of the cases cited were decided under the old O. 34 of RHC 1980 which principles are applicable to the current O. 34 of ROC 2012.

[30] The Federal Court in *Syed Omar Syed Mohamed v. Perbadanan Nasional Bhd* [2012] 9 CLJ 557; [2013] 1 AMR 1 ruled under O. 34 r. 1(3) of the ROC 2012 the court is required to take into account all the breaches and non-compliance by the plaintiff at the time of evaluation of its failure to progress the case before deciding whether to dismiss the action.

[31] In *Md Amin Md Yusof & Anor v. Cityvilla Sdn Bhd* [2004] 3 CLJ 88 at p. 89 the Court of Appeal held:

> Order 34 r. 7 provides for the discretionary power of the judge to make such order against the defaulting party "as meets the ends of justice" should any party fail to comply with any direction given by the judge at

any pre-trial case management conference.

Whilst it is true that a party's action or counterclaim could be struck out for non-compliance with a peremptory or an unless order of the court, the order would not be made unless there is a history of failure to comply with other orders. A peremptory or an unless order is an order of last resort (see *Hytec Ltd v. Coventry City Council* [1997] 1 WLR 1666 at p. 1674 para H). Surely, it would not meet the ends of justice if the order made results in a miscarriage of justice. Therefore, all the circumstances of the case, inclusive of whether the failure to comply with the peremptory or unless order was indeed intentional and contumelious, should be looked at by the judge before penalizing the defaulting party (see *In re Jokai Tea Holdings Ltd (Note)* [1992] 1 WLR 1196 CA).

[32] The Court of Appeal allowed the defendant's appeal against the decision of the High Court which struck out the defendant's counterclaim for defaulting in complying with the directions of the learned judge. On the facts, the court found that the learned judge had overlooked the fact that the respondent too was not free from fault in that it also failed to comply with the learned judge's directions, a factor which certainly must be taken into account in considering whether the striking out order is appropriate as decided in *United Malayan Banking Corporation Bhd v. Palm and Vegetable Oils (M) Sdn Bhd & Ors* [1994] 3 CLJ 144. The court further held:

Such an oversight on the part of the learned judge, to our mind, had adversely affected his decision in entertaining the respondent's application to strike out the appellants' counterclaim. Since the respondent and the appellants are equally at fault, we see no good reasons why the court should be more harsh towards the appellants than the respondent. The court should not favour any one party and justice would demand that the case be allowed to proceed (see *Lee Mun Tuck v. Tan Chin Kah & Anor* [1991] 1 CLJ 631; [1991] 4 CLJ (Rep) 929; *Transcom Rand (M) Sdn Bhd v. MARA Holdings Sdn Bhd* [2002] 6 CLJ 492).

Besides, there was no wholesale disregard of the rules of the court by the appellants. The appellants were still in the process of trying to reach an agreement with the respondent over the documents to be filed. From the records and the explanations given by the appellants we found that the appellants' failure to comply with the directions was not intentional or contumelious justifying the drastic action taken by the learned judge. Moreover, there was no record to show that learned counsel for the appellants was ever afforded an opportunity to reply to the respondent's application for the striking out of the appellants' counterclaim. In this case, the learned judge proceeded straight to strike out the appellants' counterclaim soon after hearing the submission of learned counsel for the respondent. In our judgment, his decision was thus fatally flawed and wrong in principle which had resulted in an injustice to the appellants who have been deprived of their right to have their counterclaim heard on its

merit. The learned judge's decision does not meet the ends of justice.

[33] In *Sunway PMI Pile Construction Sdn Bhd v. Pembenaan Chan & Chua Sdn Bhd (supra)* the High Court held:

> The present O. 34 was introduced by amendments to the Rules *vide* PU(A) 342/2000, which came into effect on 22 September 2000. The amendments made extensive changes to the procedure to be followed before the trial of an action. They envisage the court taking a proactive role in setting down timeframes and giving directions as to the preparation of each party's case for the purposes of the trial, while enabling the court to impose sanctions for non-compliance with those directions.

[34] Based on the facts, the learned judge found that the defendant's solicitor has displayed a nonchalant attitude in their approach to the orders and directions given by the court. The failure by the defendant to respond to the many letters of the plaintiff for the purpose of complying with the court's direction to prepare the bundle of documents, statement of agreed facts and issues for the trial had hindered the plaintiff from proceeding with the action. The learned judge held under the circumstances it was a proper case for the court to exercise its powers under O. 34 r. 7 of the RHC and ordered that the defence and counterclaim be dismissed and that judgment be entered for the plaintiff as per the statement of claim.

Findings Of Court

[35] As much as I am guided by the principles laid out in the authorities, whether an order under O. 34 r. 2(3) of the ROC 2012 ought to be made or otherwise will ultimately depend on the facts of the instant case. The facts as narrated above shows the defendant had, on three occasions disregarded the court directions issued for the purpose of moving the writ action towards a full trial which was scheduled to commence on 11 April 2017. The said three occasions are as follows:

(a) the first occasion was when it failed to respond to the plaintiff on the classification of the documents to enable the bundle of documents to be filed by 10 March 2017 as directed by the court on 2 March 2017. The plaintiff's solicitor had sent to the defendant's solicitor a letter dated 2 February 2017 enclosing the plaintiff's bundle of documents for the defendant's classification. At the same time, the plaintiff's solicitor also requested for the defendant's document for purpose of incorporating the same in the bundle of document. The defendant's solicitor did not reply. Such failure has hindered the plaintiff, who is responsible for filing the bundle of documents, from preparing and filing the bundle of documents in court on 10 March 2017. It was only on the case management date on 13 March 2017 (which is three days after the deadline 10 March 2017) that the defendant informed the plaintiff of their position in

respect of the documents to be under part B and that they have no documents to be included in the bundle of documents. In the defendant's affidavit opposing the plaintiff's encl. 59 the defendant did not provide or offer any explanation why they failed to respond to the plaintiff's letter dated 2 February 2017;

(b) the second occasion was when the defendant failed to file its case summary and list of witnesses on 23 March 2017 as directed by the court on 13 March 2017. When I issued the direction I had also informed parties that failure to do so would result in the case being struck out. On the part of the plaintiff, they had duly e-filed their case summary and list of witnesses on 22 March 2017 (see exh. "LQS-3" to encl. 60 for the e-filing receipt). The plaintiff has also filed the agreed list of issues to be tried and the statement of agreed facts (see exh. "LSQ-4" to encl. 60 for the e-filing receipt). On the next case management date, namely 24 March 2017, again the court was informed that the defendant failed to file the required documents on 23 March 2017. Recognising the grave consequences on the defendant if the court were to enforce the unless order, I allowed the defendant's oral application for extension of time to file its case summary and list of witnesses and fixed 31 March 2017 (and not 3 April 2017 as requested by the defendant) as the date to file the two documents. I have also informed defendant if they failed to comply with the direction, unless order will be made against them;

(c) the third occasion was when the defendant failed to file and exchange with the plaintiff their witness statement on 4 April 2017. In its affidavit encl. 59 the plaintiff's solicitor avers that they were informed by the defendant's solicitor that the defendant's witness statement was not ready and that the same will be filed before the trial without specifying when (the date) exactly the witness statement will be filed. The defendant's solicitor did not, in their affidavit encl. 63 contradict the said averment. Thus on the basis of *Ng Hee Thoong & Anor v. Public Bank Bhd* [2000] 1 CLJ 503; [2000] 2 MLJ 29 the defendant is deemed to have admitted the factual averment. Thus it is abundantly clear that even though at that point in time the date for filing (as directed by the court) has already lapsed, the defendant did not have the sense of urgency to specify the exact date their witness statement will be filed.

[36] The writ action filed by the plaintiff is premised on the various reinsurance contract entered between the plaintiff and defendant. The defendant disputed the plaintiff's claim and denied liability. Obviously, the writ action involves pleaded facts which are challenged by the defendant. Under the circumstances, witnesses from both parties need to be called to testify and to be cross-examined in order to adduce evidence. Insofar as the requirement for evidence of witnesses, O. 38 of the ROC 2012 provides:

38 Evidence: General

1. General rule: Witness to be examined orally (O. 38 r. 1)

Subject to the provisions of these Rules and of the Evidence Act 1950 [Act 56] and any other written law relating to evidence, any fact required to be proved at the trial of any action begun by writ by the evidence of witnesses shall be proved by the examination of the witnesses in open Court.

2. Evidence by witness statement (O. 38 r. 2)

(1) Notwithstanding rule 1, and unless otherwise provided by any written law or by these Rules, at the trial of an action commenced by writ, evidence-in-chief of a witness shall be given by way of witness statement and, unless the Court otherwise orders or the parties to the action otherwise agree and subject to such directions as the Court may make, such a witness shall attend trial for cross-examination and, in default of his attendance, his witness statement shall not be received in evidence except with the leave of the Court.

...

(4) Unless otherwise ordered by the Court, a witness statement must be filed in Court and served on the other parties to the action not less than seven days before it is to be tendered and read at the trial.

[37] It is therefore crucial, for the purpose of the trial, that both parties file in court and exchange their witness statements. Witness statement serves as the examination-in-chief of each of the witnesses who will be called to testify. In *PP v. Wong Yee Sen & Ors* [1990] 1 CLJ 325; [1990] 2 CLJ (Rep) 902; [1990] 1 MLJ 187, at p. 905 (CLJ); p. 189 (MLJ), the learned High Court Judge explained the importance of cross-examination as follows:

> What is the aim of cross-examination? Really there is one aim only. It is to assist in the administration of justice by revealing the truth to the court. The function of cross-examination is to eliminate or reduce the danger that a false conclusion will be reached. Wigmore has declared that cross-examination is beyond doubt the greatest engine ever invented for the discovery of truth.

[38] In the instant case, the parties were directed to file and serve their witness statement seven days before the trial to enable parties to sufficiently prepare their case in particular with the cross-examination of the witnesses. The testimonial evidence of the witnesses will be evaluated by the court for purpose of determining the truth in relation to the issues in contention and subsequently make a finding whether the plaintiff has proven their case on balance of probabilities.

[39] As such it is vital for the witness statement of the defendant's witnesses to be made available to the plaintiff who had, on 4 April 2017, duly e-filed their witness statement (see exh. "LQS-5" to plaintiff's affidavit encl. 60) in compliance with the court order made on 3 April 2017. However, the defendant, in defiance of the said court order failed to do so. No application for extension of time was made by the defendant for leave to file the witness statements on a date other than the date fixed by the court. Instead, in their affidavit encl. 63 affirmed on 6 April 2017 (opposing the plaintiff's application encl. 59), the defendant firmly announced that they are only able to finalise the witness statement and file it on 7 April 2017, which is about three days before the first day of trial. This would certainly deprive the plaintiff of a proper and adequate preparation for the trial. The reasons given for the delay are:

(a) the defendant faces difficulty to prepare and finalise the witness statement due to non-availability of detail information of the plaintiff's claim because their application for further and better particulars was dismissed by this court; and

(b) the defendant's witness one En Sharafat Ali had just returned to Malaysia after undergoing medical treatment in his country. No further information and/or documents were provided to support such averment.

[40] Having considered the facts gathered from what had transpired, I am of the view the reasons given by the defendant are simply devoid of merits:

(a) the first reason, being deprived of further and better particulars, is no longer an issue at this stage. As stated above, their appeal against my decision dismissing their application for further and better particulars was dismissed by the Court of Appeal. The defendant's solicitor at para. 7 of the defendant's affidavit encl. 7 deposed the following:

> Kami telah berhujah pada Mahkamah Rayuan bahawa butir-butiran yang telah diminta adalah diperlukan untuk Defendan membela tindakan ini. Saya selaku peguamcara Defendan telah mengendalikan rayuan ini di Mahkamah Rayuan. Dalam pendengaran tersebut, hakim-hakim Mahkamah Rayuan tidak menolak fakta bahawa butir-butiran yang dipohon adalah penting dan diperlukan untuk membela tuntutan Plaintif namun mereka juga berpendapat bahawa oleh kerana kes ini telah ditetapkan untuk perbicaraan pada 11hb sehingga 14hb April 2017, maka perbicaraan harus diteruskan. Di atas sebab berikut, rayuan Defendan telah ditolak dengan perintah kos dalam kausa.

I do not have the benefit of the basis of the decision made by the Court of Appeal in dismissing the defendant's appeal. Nevertheless, going by what the defendant's solicitor deposed in the said para. 7, it is obvious that the Court of Appeal took the stance that the trial of the writ action is to proceed as scheduled. Therefore, it is incumbent on the parties to take all the necessary steps which include strict adherence to the pre-trial directions given by the court. Moreover, the defendant's solicitor is not in the position to use the purported lack of detailed information as an excuse for their non-adherence. Since the defendant's solicitor Messrs Azmi & Associates has agreed to accept the defendant's case, the solicitor must make sure they are able to comply with the court's direction in the manner determined by the court. Otherwise, the solicitor should not have agreed to take over the defendant's case from the previous solicitor Messrs Skrine. In any event, the defendant's solicitor, as stated in his affidavit, had appeared before the Court of Appeal to conduct the defendant's appeal. As such he is well aware of the nature of the plaintiff's claim and the defence and the purported lack of information to defend the case;

(b) in respect of the second reason, it is a bare assertion on the part of the defendant as there was no evidence adduced to show that the said witness was out of the country during the material time and that he had obtained medical treatment. Based on records, the trial dates 11 until 14 April 2017 was fixed by the court on 8 December 2016. As such when the present solicitor took over the conduct of the matter from the previous solicitor on 23 January 2017, they knew that trial dates were already set by the court. In fact, when directions were made on 3 April 2017 for parties to file their witness statement on the next day, namely, 4 April 2017 there were no indication whatsoever from the defendant's solicitor that they would not be able to do so because the defendant's witness is abroad seeking medical treatment. In this respect, I refer to para. 9 of the defendant's affidavit their solicitor attested as follows:

> Oleh yang demikian, kami menghadapi kesusahan untuk memuktamadkan ("finalize") Pernyataan Saksi. Tambahan juga, saksi yang bakal dipanggil Defendan iaitu En. Sharafat Ali baru sahaja pulang dari negara asalnya setelah mendapatkan rawatan kesihatan maka pernyataan saksinya kini dapat dimuktamadkan dan akan difailkan pada 7 April 2017.

As I have said earlier, there is no proof to show the said witness was abroad. So, one could not say when the said witness came back to Malaysia as stated in the said paragraph. In this respect, it must be noted that the directions to file the witness statement (on 4 April 2017) was made on 3 April 2017 and the defendant's counsel affirmed the affidavit

resisting encl. 59 on 6 April 2017. At the risk of speculating, the said witness could have been abroad on 3 April 2017 or he could have just arrived back in Malaysia on that day. Whatever the situation was then, the fact is that when directions were given on 3 April 2017 for parties to file and exchange the witness statement the defendant's solicitor agreed. As such the defendant's solicitor is duty-bound to comply with such direction. It is to be noted that after 3 April 2017 and before the hearing of the plaintiff's application encl. 59 on 7 April 2017, there was no attempt or effort made by the defendant's solicitor to seek leave of the court to extend the time for the filing of their witness statement even though by 6 April 2017 the defendant's solicitor was already served with encl. 59. Under the circumstances, I am compelled to conclude this second reason is an afterthought.

(c) I am mindful that the defendant's witness statement was finally filed on 7 July 2014 which is three days after the date it is supposed to be filed and exchanged with the plaintiff's witness statement and three days before the commencement of the trial. The defendant submits there is only a few days delay on their part in complying with the court direction. This may be so but the fact remains there was non-compliance on the part of the defendant with the court's pre-trial directions, not once but thrice. In relation to filing and exchanging witness statement, it has certainly deprived the plaintiff of the benefit of the defendant's witness testimony in the examination-in-chief for the purpose of a proper and adequate pre-trial preparation.

(d) during hearing of encl. 59, the defendant's solicitor said that they had, in other cases, filed witness statement just before the hearing date. In this respect, it must be borne in mind that every case must be dealt on the merits of its own facts. The defendant's solicitor did not provide other information (including reports, facts, *ratio decidendi*) in respect of the cases he mentioned for the consideration of the court. In any event, such statement, which was not in the affidavit opposing encl. 59, is a statement from the bar and therefore is of no probative value.

[41] I refer to the two cases which the plaintiff cited to support their application encl. 59. In both cases, the parties failed to comply with the direction of the court for the witness statement to be filed within the time as directed. The two cases serve as an illustration of the court exercising its discretionary powers under O. 34 r. 7 of the RHC 1980 and the current O. 34 ROC 2012. Whether to invoke O. 34 ROC 2012 or otherwise is a question of facts.

(a) In *Hong Leong Assurance Bhd v. American Home Assurance Company-Malaysia* [2008] 1 LNS 141; [2008] 8 MLJ 547 the plaintiff's claim was struck out due to the plaintiff's failure to file the witness statement 21 days before the trial. The plaintiff failed to comply with the direction and on the hearing date, the plaintiff's counsel requested for an adjournment to comply with the direction. The reasons offered for the noncompliance was that the original dates of the trial had been deferred by the court (twice to make way for pre-2000 cases) and that there were amendments to the statement of defence subsequent to the pre-trial direction. The dates of the trial were fixed almost three years ago in 2005 and the direction to file witness statement were made on the same day. The learned judge rejected the reason and the request for adjournment and dismissed the plaintiff's action. The learned judge had this to say:

> In my judgment, the action ought to be dismissed as there was clear non-compliance with the Court's previous case management direction, the non-compliance being of such a nature as to give me the impression that the plaintiff has scant respect for the Court's case management directions and was not serious in prosecuting its claim against the defendant.
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> ...
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> In dismissing the plaintiff's action for non-compliance, I had invoked Order 34 rule 7 of the Rules of the High Court 1980. Considering the circumstances of the case, I am of the view that by dismissing the suit - but making no order as to costs - would meet the ends of justice. It is true that in the present case the counsel for the defendant (also to my dismay) did not object when the counsel for the plaintiff sought an adjournment so that the plaintiff could comply with the Court's direction of 27 April 2005. But then, on the other hand, it is highly pertinent to observe that the case was registered in 2003, and yet five years later in 2008 the Court, due to a serious default on the part of the plaintiff, is not able to proceed with the trial. I think it is ridiculous and an affront to the proper administration of justice for the Court to grant the plaintiff the adjournment sought so that the plaintiff could comply with a direction given three years ago in 2005! There are times when Courts have to be firm with litigants in order to prevent the administration of justice from falling into disrepute.

(b) The second case is a defamation suit filed in 2008. In *Tan Sri Datuk Diong Hiew King v. Lau Swee Nguong* [2012] 1 LNS 1086; [2014] 8 MLJ 575; parties were directed to file and exchange their witness statement by 27 July 2012. Such direction was made on 21 June 2012. The defendant had only one witness statement, that is his own whilst plaintiff

had six. Prior to the direction, attempt was made by the defendant's solicitor for the trial dates which was fixed on 10 to 12 September 2012 to be vacated on the ground that counsel handling the matter would be abroad but the request was rejected by the court. On 30 July 2012, three days after the date on which the defendant was supposed to file his witness statement, the defendant informed the court that the defendant would be changing solicitor for the second time and requested for an extension of time from 27 July 2012 to 10 August 2012 to file and exchange the witness statement. The request was rejected by the court on 31 July 2012. The witness statement was only filed by the defendant on 9 August 2012. During case management on 10 August 2012 upon the failure of the defendant to comply with the direction to file and exchange his witness statement, the court, in exercise of its discretion under O. 34 r. 2(3) of the ROC 2012 struck out the defence, entered judgment for the plaintiff and ordered damages to be assessed. The reasons for such decision includes the following:

> The court agreed with and accepted the submissions of the learned counsel for the plaintiff that the failure of the defendant to comply with the direction of the court given on 21 June 2012 constituted an abuse of the process of the court.
>
> The reasons are, firstly, it had obstructed the smooth administration of justice by the court in respect of the plaintiff's action. Secondly, it has caused the *bona fides* of the defendant's defence to the plaintiff's claim as set out in his defence to be highly questionable. Thirdly, the court was of the impression that the defendant was not really sincere in defending the plaintiff's claim.
>
> The defendant could not show any reason for his noncompliance of the previous direction of the court to file and exchange his witness statement with the learned counsel for the plaintiff on or before 27 July 2012 let alone a good reason.

[42] It is noted that the above two cases are old cases registered in 2003 and 2008 respectively but I do not think the management of old cases by the court should be of any different standard from that of current cases. What is important is moving the case towards an expeditious disposal in a just and economical manner. It is therefore the duty of the parties to cooperate with the court by adhering strictly to the directions given by the court. The defaulting party may have remedied the breach (as in the case of *Diong Hiew King @ Tiong Hiew King (supra)* where the witness statement was eventually filed but three days after the date fixed by court) but that would not matter if, upon evaluation of the overall conduct of the defaulting party, it hinders the court from administering justice appropriately.

[43] Based on the authorities, I am required to consider the breaches and non-compliance by the defendant before deciding on the plaintiff's application encl. 59. I am also required to consider the circumstances of the case for the purpose of determining whether non-compliance by the defendant is intentional and contumelious. Besides that, the plaintiff's conduct must also be considered whether they have defaulted in complying with the directions issued by this court.

[44] As stated in para. 35 above the defendant has, on more than one occasion defaulted in complying with the court directions. In all the occasions the plaintiff has duly complied with court direction. In one occasion where the plaintiff failed to file the bundle of documents on 13 March 2017, it was due to the defendant's failure to inform the plaintiff the category of the documents. This prevented the plaintiff from preparing and finalising the bundle of documents. Insofar as the witness statement is concerned the plaintiff has duly e-filed it in court on 4 April 2017 and was ready to exchange it with the defendant.

[45] The reasons given for not filing the witness statement on 4 April 2016 is simply unacceptable. The defendant's solicitor, although fully aware that they were in breach for not filing the witness statement on 4 April 2017 and served with an application by the plaintiff to have their defence strike out for such breach was content to only file an affidavit resisting the plaintiff's application without taking any step to rectify their breach, at least by filing an application, on urgency basis, to extend the time to file the witness statement.

[46] The defendant's conduct under such a situation, and the previous failure to comply with the court directions, to my mind, display a nonchalant attitude of the defendant's solicitor towards the court directions. The court was prepared to allow the defendant space and opportunity when they failed to comply with the directions made on 2 March 2017 and 13 March 2017. Having given the opportunity to redeem itself, the defendant ought to be vigilant in the manner how they manage their case. However, this is not to be. Having considered the defendant's latest breach and their conduct in relation to complying with the direction to file the witness statement, I am constrained to construe such conduct as intentional and contumelious. Such conduct has cast serious doubt on the defendant's sincerity to discharge its duty to assist the court in the expeditious, just and economical disposal of the writ action.

Conclusion

[47] At the risk of repetition, whether to invoke O. 34 r. 2(3) of the ROC 2012 is a question of facts. In the instant case, premised on the facts and reasons stated above it is my considered opinion that the defendant has

deliberately disregarded the court directions contumeliously and intentionally. As such, I took the stand that it is appropriate for the court to invoke O. 34 r. 2(3) of the ROC 2012. Such order may be drastic but it is crucially necessary to ensure the underlying objective of a robust case management system which does not easily tolerate lax enforcement of case management directions (*How Hock Sing v. Lee Say Peng & Ors* [2015] 9 CLJ 368). I therefore allowed the plaintiff's application encl. 59 and ordered that judgment be entered in favour of the plaintiff for the sum claimed as stated in the amended statement of claim with interest and costs.

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